

05-256

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
WCS LICENSE SUBSIDIARY, LLC) File No. 0002240823
)
Application for Transfer of Control from WCS)
Wireless, Inc. to XM Satellite Radio Holdings Inc.)

PETITION TO DENY

The Wireless Communications Association International, Inc. ("WCA"),¹ by its attorneys and pursuant to Section 1.939 of the Commission's Rules, hereby petitions the Commission to deny in part the above-captioned application for Commission consent to the transfer of control of WCS Wireless License Subsidiary, LLC ("WCS Wireless License Subsidiary") from WCS Wireless, Inc. ("WCS Wireless") to XM Satellite Radio Holdings Inc. ("XM") (the "Transfer of Control Application")². More specifically, WCA urges the Commission to deny the Transfer of Control Application to the extent the it proposes, albeit buried in a footnote, the assignment of WCS Wireless' pending Amended Request for Waiver of Section 27.50(a) (the "Waiver Request")³ to XM without affording the public the notice and opportunity to comment afforded by Sections 1.927(h) and 1.933(b) of the Commission's Rules.

¹ WCA is the trade association of the wireless broadband industry. Its members include system operators, equipment vendors and licensees that utilize a wide variety of spectrum to provide subscribers wireless broadband services. WCA's members include entities that hold Wireless Communications Service ("WCS") licenses for channels adjacent to those at issue here and thus may be adversely impacted by a grant in full of the instant application.

² WCS Wireless, Transferor, and XM Satellite Radio Holdings, Transferee, Application for Assignments of Authorization and Transfers of Control, File No. 0002240823, at Ex. 1 n. 1 (filed July 15, 2005) ["Transfer of Control Application"].

³ WCS Wireless, Amended Request for Waiver of Section 27.5, DA 05-1662, File Nos. 0002109551 *et al.* (filed May 16, 2005) ["Waiver Request"]. WCA has filed various pleadings in response to the Commission's request for (continued on next page)

WCA strongly opposes XM's attempt to secure a waiver of Section 27.50(a) for its own benefit without either justifying its need for a deviation from the current rules or affording the public notice and an opportunity to comment on that justification. As WCA noted in its reply comments regarding the Waiver Request, the acquisition by XM of control over the WCS licensees at issue here moots the Waiver Request because the circumstances cited by WCS Wireless to support grant of a waiver have clearly changed.⁴ The Waiver Request asks the Commission to permit operation of WCS facilities with a maximum transmit power of 2000 watts *average* equivalent isotropically radiated power ("EIRP"), rather than the maximum transmit power of 2000 watts *peak* EIRP permitted under Section 27.50(a) of the Commission's Rules.⁵ WCS Wireless claimed at the time that it intended "to provide a one-way datacasting service" and that "[w]ithout waiver . . . [WCS Wireless] believes it will be difficult going forward to attract investment" in its WCS business plan.⁶ With the filing of the Transfer of Control Application, it is now clear that WCS Wireless' business plan has undergone a

comment on the Waiver Request and has demonstrated, *inter alia*, that a grant of the Waiver Request will subject adjacent channel WCS licensees to interference. See *Opposition of the Wireless Communications Ass'n Int'l to Amended Request for Waiver*, DA 05-1662 (filed July 5, 2005); *Reply of the Wireless Communications Ass'n Int'l*, DA 05-1662 (filed July 15, 2005) ["WCA Reply Comments"]; Letter from Paul J. Sinderbrand, Counsel, Wireless Communications Ass'n Int'l, to Marlene H. Dortch, Secretary, FCC, DA 05-1662 (filed Aug. 1, 2005).

As a preliminary matter, it is worth noting that the Transfer of Control Application fundamentally misrepresents the Waiver Request by claiming that "WCS License Sub currently has pending an application for a waiver of Section 27.50(a) of the Commission's rules." *Id.* at Ex. 1 n. 1. To the contrary, the *WCS Waiver Request* was filed by *WCS Wireless*, not by *WCS Wireless License Subsidiary* – indeed, the name "*WCS Wireless License Subsidiary, LLC*" appears nowhere in the *Waiver Request* or the Commission's public notice soliciting comment on the *Waiver Request*. See *Waiver Request* at 3 ("[b]y this submission, WCS Wireless LLC...requests a waiver of Section 27.50 of the Commission's rules to allow maximum permissible power to be calculated on an average power basis rather than a peak power basis for the [WCS]."). See also *Wireless Telecommunications Bureau Seeks Comment On WCS Wireless, LLC Request For Waiver Of Section 27.50(a)*, Public Notice, DA 05-1622 (rel. June 15, 2005) ("[o]n April 1 and May 19, 2005, respectively, WCS Wireless, LLC...filed sixteen applications, accompanied by a request for waiver of Section 27.50(a) of the Commission's Rules, 47 C.F.R. § 27.50(a).") (citation omitted).

⁴ See WCA Reply Comments at 1-2.

⁵ See Waiver Request at 3.

⁶ *Id.* at 12.

substantial revision. Rather than develop the promised one-way datacasting network that it trumpeted in its Waiver Request, WCS Wireless has agreed to sell WCS Wireless License Subsidiary to XM!

As such, the Waiver Request should be dismissed as moot – WCS Wireless will not be implementing any business plan other than to sell WCS Wireless License Subsidiary to XM, and thus it cannot be said that WCS Wireless requires a waiver of Section 27.50(a) to spur investment in its now-abandoned WCS-based datacasting business.⁷ As WCA has already pointed out, “[i]f . . . XM desires to operate its newly-acquired WCS authorizations at a higher power than permitted under Section 27.50(a), then XM will have to make its own case, explaining why it cannot operate in compliance with the current rules and explaining how its proposal will be benign towards other WCS licensees.”⁸

Should the Commission permit assignment of the Waiver Request from WCS Wireless to XM, there is no basis for waiving Sections 1.927(h) and 1.933(b) of the Commission’s Rules, as XM now requests. Significantly, *in responding to Question 5(a) of FCC Form 603, the Transfer of Control Application represents to the Commission that the parties are not seeking any waiver of the rules.* The Commission should not allow XM to make such a representation to the Commission and to members of the public in the application form, then bury a waiver request in a footnote to an exhibit. WCA was fortunate to have uncovered this effort to obscure the request – other interested members of the public may not have been so lucky.

Moreover, the request for waiver of Sections 1.927(h) and 1.933(b) is fatally flawed by XM’s failure to satisfy the requirement of Section 1.925 of the Commission Rules that one

⁷ See WCA Reply Comments at 1-2.

⁸ *Id.* at 2 n. 6.

seeking a waiver must provide “a complete explanation as to why the waiver is desired.”⁹ All XM offers is that “[t]he exemption is requested so that an amendment to reflect the new ownership of WCS License Sub will not be treated as a major amendment requiring a second public notice for the waiver application.”¹⁰ That explanation, however, hardly establishes either that “the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case” or that “[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest,” which are essential prerequisites to the grant of a waiver under Section 1.925(c) of the Commission’s Rules.¹¹

XM’s failure to meet its burden under Section 1.925(c) of the Commission’s Rules is not surprising. The purpose behind Sections 1.927(h) and 1.933(b) is patently obvious – it is to provide notice and an opportunity for the public to comment whenever an application that has appeared on public notice as accepted for filing is amended to affect a major change.¹² Section 1.927(h) provides that “[w]here an amendment to an application constitutes a major change, as defined in §1.929, the application shall be treated as a new application for determination of filing date, public notice, and petition to deny purposes.”¹³ Section 1.929(a)(2), in turn, makes clear that “[a]ny substantial change in ownership or control” constitutes a major change.¹⁴ Failure by

⁹ 47 C.F.R. § 1.925(b)(2).

¹⁰ Transfer of Control Application, at Ex. n.

¹¹ See 47 C.F.R. § 1.925(c).

¹² See, e.g., *Red New York E Partnership*, Memorandum Opinion and Order, 8 FCC Rcd 6767, 6769 (1993) (“[t]he purpose of [placing a major amendment] on public notice is...to permit interested parties an opportunity to file comments or petitions in response to the amendment.”).

¹³ 47 C.F.R. § 1.927(h).

¹⁴ 47 C.F.R. § 1.929(a)(2).

the Commission either to issue a public notice announcing the assignment of the Waiver Request to XM or to afford the public an opportunity to comment would clearly be contrary to the purpose underlying these rules, and one would be hard pressed to identify any unique circumstances here that would justify a departure from those rules.¹⁵ Clearly, given the change in circumstances since the filing of the Waiver Request (including the elimination of the fundamental reason cited by WCS Wireless for grant of the waiver), XM cannot simply "step into the shoes" of WCS Wireless. Rather, if XM desires a waiver of the WCS power limitations set forth in Section 27.50(a), it must submit an amendment that reflects the assignment from WCS Wireless to XM and make its own case for a waiver, establishing how XM meets the waiver benchmarks set forth in Section 1.925.¹⁶

WHEREFORE, for the reasons set forth above, the Commission should refuse to permit assignment of the Waiver Request to XM and instead should dismiss the Waiver Request as moot. Should the Commission nonetheless permit such an assignment, the Commission should deny XM's request for a waiver of Sections 1.927(h) and 1.933(b) of the Commission's Rules. Instead, XM should be required to file a major change amendment to the Waiver Request to

¹⁵ The Transfer of Control Application cites to the Commission order approving the NYNEX/Bell Atlantic merger in support for permitting assignment of the Waiver Request to XM without affording the public notice and an opportunity to comment. However, while the ordering clause cited by XM does authorize the transfer of pending waiver requests, it is far from clear that the NYNEX/Bell Atlantic merger actually involved any pending request for waiver of the Commission's rules. Certainly the order approving that merger does not discuss any pending waiver requests, and thus XM is off base in implying that the NYNEX/Bell Atlantic decision is in any way dispositive in the instant proceeding. See *NYNEX, Transferor, and Bell Atlantic Transferee*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20097 (1997) (citation omitted). Similarly flawed is XM's reliance on the Commission order approving the Century Telephone/PacifiCorp Holdings transfer of control. There, the issue of whether to grant an exemption from the rules which require the filing of an amendment to pending applications to reflect the consummation of the proposed transfer of control was never discussed on the merits. *PacifiCorp Holdings, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 8891, 8915 (1997) (citation omitted). Once again, it is significant that there was no waiver pending similar to the Waiver Request, and thus that decision is hardly persuasive on whether the Commission should grant an exemption from Sections 1.927(h) and 1.933(b) in the instant proceeding.

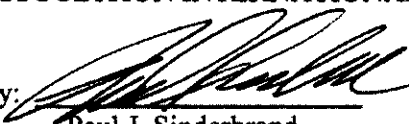
¹⁶ In this regard, WCA would hope that XM would do a better job than WCS Wireless in establishing how it intends to protect from interference the operations of adjacent WCS licensees. As WCA and others have clearly established, WCS Wireless' showings have been woefully inadequate. See *supra* note 2.

reflect the assignment of the Waiver Request and to establish why XM should be entitled to a waiver of Section 27.50(a). That amended waiver request should then be placed on public notice to allow for comment by interested parties, as contemplated by Sections 1.927(h), 1.929(a)(2) and 1.933(b).

Respectfully submitted,

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August 3, 2005

CERTIFICATE OF SERVICE

I, Michelle A. Bynum, hereby certify that on this 3rd day of August, 2005 I served the foregoing "Petition to Deny" by depositing true copies thereof with the United States Postal Service, first class postage pre-paid and addressed to the following:

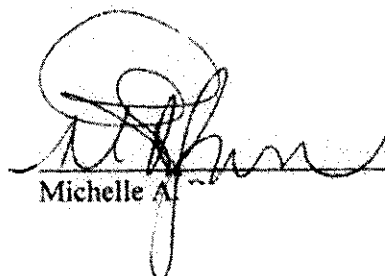
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